

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air Warming Devices Products Liability Litigation) File No. 15-MD-2666
) (JNE/FLN)
) February 16, 2017
) Minneapolis, Minnesota
) Courtroom 12W
) 9:45 a.m.
)
)

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

THE HONORABLE FRANKLIN L. NOEL
UNITED STATES MAGISTRATE JUDGE
(By Telephone)

THE HONORABLE WILLIAM H. LEARY, III
RAMSEY COUNTY DISTRICT JUDGE

(STATUS CONFERENCE)

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5 Proceedings recorded by mechanical stenography;
6 transcript produced by computer.

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1 (9:42 a.m.)

2 IN OPEN COURT

3 THE COURT: Good morning, everybody. Welcome
4 back. Let me check and make sure -- please be seated.

5 Judge Noel was planning to participate by telephone.

6 MAGISTRATE JUDGE NOEL: I am here.

7 THE COURT: Hello Frank. I mean Judge.

8 MAGISTRATE JUDGE NOEL: How are you?

9 JUDGE LEARY: I'm keeping your seat warm, Frank.

10 THE COURT: I am going to try to turn you to a
11 higher volume.

12 MAGISTRATE JUDGE NOEL: I was going to mute my
13 phone because I'm sitting at a Starbucks, so I'll just
14 listen in. If I need to say anything, I'll unmute and speak
15 up loudly if I can, if that's okay.

16 THE COURT: Judge Leary and I were talking about
17 how wonderful it is to have that first morning cup of
18 coffee. It's really early out there.

19 MAGISTRATE JUDGE NOEL: It is indeed.

20 THE COURT: That's ridiculous.

21 Okay. Judge Leary, thank you very much for coming
22 over.

23 JUDGE LEARY: Thanks for the invitation.

24 THE COURT: It's nice to have you sitting up here.

25 JUDGE LEARY: I feel like I graduated.

1 THE COURT: It's not as fun as it looks.

2 For your benefit, Frank, everybody is here, all
3 the usual suspects. No strangers, I don't believe. And do
4 we have the people on the phone, Mark, do you know? The
5 phone participants? Okay.

6 All right. Well, let's start marching through the
7 agenda. The pretrial order remains in effect. That's all
8 going swimmingly. We don't have any issues about any dates,
9 I don't believe.

10 The plaintiff fact sheets, anybody want to say
11 anything about that? Mr. Hulse?

12 MR. HULSE: Good morning, Your Honor. Just
13 briefly, we're going through the process required by PTO14.
14 We sent out deficiency notices. We're getting amended PFS's
15 in from many of the plaintiffs, and next month will be the
16 first month where assuming that there is some unresolved
17 issues that we will start to list deficient PFS's on the
18 status report as provided by PTO14.

19 THE COURT: But none yet?

20 MR. HULSE: Not at this point, no. We're
21 continuing the meet and confer process.

22 MR. GORDON: We agree with that, Your Honor.
23 Nothing to report at this time.

24 THE COURT: All right. And then on the bellwether
25 selection plan, Mr. Gordon, did you want to say anything

1 about that?

2 MR. GORDON: Your Honor, if I may, I could give
3 the Court a brief update with respect to the requirement
4 that the Court issued recently in terms of the Lexecon
5 numbers. As of just a few minutes ago, the latest numbers
6 that we show, and we're doing everything we can to meet or
7 beat the Court's February 28th deadline, we have now 114
8 plaintiffs who have affirmatively waived Lexecon. No
9 objection to trying the case here in Minnesota. We have 15
10 plaintiffs who have affirmatively not waived their right to
11 Lexecon.

12 And most of those, to my specific understanding in
13 talking to counsel who have those cases, relate to issues of
14 mobility or dire health concerns. In a couple of instances,
15 plaintiffs have passed away recently, and so there are
16 estate issues that need to be --

17 THE COURT: Should be easy to get a waiver.

18 MR. GORDON: Well, you would think, but given the
19 estate issues that have to be handled, we're not even sure
20 in some of those who would be the person to give that
21 waiver, so.

22 THE COURT: Right.

23 MR. GORDON: But there are 15 of those who have at
24 this point not waived. There are 15 who are simply unknown
25 who haven't responded for one reason or another, and we're

1 doing everything we can to get those responses. And there
2 are six that have been dismissed.

3 So with the 114, 15 not waived, 15 unknown, and
4 six dismissed, that's the 150. And we're hopeful, we've met
5 and conferred with the defense this morning, and we're
6 hopeful to have answers on those remaining unknowns in the
7 next several days.

8 MS. YOUNG: Good morning, Your Honor. One
9 additional item that the parties met and conferred with
10 directly before the status conference is whether for those
11 cases that are nominated that do not present any Lexecon
12 issues, which is 30 out of about 35, whether we could move
13 forward with beginning medical records collection.

14 Your Honor's e-mail order said that the limited
15 case specific discovery was on hold, but I think the parties
16 agree that there is no need not to move forward with at
17 least the medical records collection portion of that
18 discovery beginning as early as tomorrow because we do have
19 signed authorizations from the plaintiffs.

20 MR. GORDON: We did meet and confer on that, Your
21 Honor, and we, I believe, as a group do not have any
22 objection to the collection of medical records. That is a
23 time-consuming and laborious process, and we understand from
24 the defense that the third party vendor that they've
25 selected for collection will allow us to get copies of those

1 in a fluid and efficient manner.

2 In terms of any further limited case specific
3 discovery, we think that we ought to get the bellwether
4 Lexecon issue resolved first, and I think that's what the
5 Court contemplates, so we should have that very soon.

6 THE COURT: Yes, true. Should I pick another did
7 you say 15 have affirmatively not waived?

8 MR. GORDON: Yes, Your Honor.

9 THE COURT: Should I pick another 15 now?

10 MS. YOUNG: Your Honor, that would be our
11 preference that we have opportunity then to look at those.

12 THE COURT: Instead of waiting.

13 MR. GORDON: And the expectation would be, Your
14 Honor, just to be on the clear that the 15 would be randomly
15 selected, and then from those we would again do the same
16 process.

17 THE COURT: Same thing, same thing, same hat.

18 It's actually my popcorn bowl we've used.

19 MR. BLACKWELL: We knew it.

20 MR. GORDON: Right, so there are 15 unknowns and
21 six dismissals, so there are 21 cases which would be the
22 nominator in terms of cases that we don't have to pick from
23 now.

24 I guess the question we bring up, and I may be
25 opening up Pandora's box, would we all then want to look at

1 those afresh and compare and contrast them to the others to
2 ensure we have in fact not missed some of the most
3 representative cases, and we did discuss this with the
4 defense briefly this morning.

5 In other words, the 16 we have now picked, and the
6 11, I think, the defendants have picked that don't have
7 Lexecon issues, would those then be back on the table to
8 compare to the new 21 that would be thrown in the mix? Or
9 is that just opening up --

10 THE COURT: I wonder if that's -- what do you
11 think, Ms. Young?

12 MS. YOUNG: We did discuss that this morning.
13 It's the defendant's position, Your Honor, that in order to
14 begin the medical records collection, we would have to go
15 ahead and disclose our 11 cases without Lexecon issues, and
16 by doing that, they would be set. And we're comfortable
17 with that. So we're really only talking about the five
18 cases that potentially are not candidates for trial in the
19 District of Minnesota.

20 So we would not think that adding in the 21
21 additional cases that we all had to go back to the drawing
22 board, and we would anticipate that plaintiffs' list of 16
23 was final, our list of 11 was final, and the three Ramsey
24 picks are final at this point.

25 MR. GORDON: I guess my response, Your Honor, is

1 that if the purpose is to truly select the most
2 representative cases, and there are 21 new cases coming into
3 the overall mix, how much more work would it be to evaluate
4 those as compared to the 16 we've already vetted and say, or
5 the 11 in their case, these, you know, there are two or
6 three or four more that are more representative than these
7 others. That's the goal. I don't know why we wouldn't do
8 that.

9 THE COURT: I'll pick out of the popcorn bowl, and
10 we will proceed on the assumption that the representative
11 nature of the selection will be acceptable unless you take a
12 look at those, and you have some issue, in which case talk
13 to each other or bring it up, but I'm hoping to move things
14 along faster, not change the procedure, but just rather than
15 waiting until February 28th. We know we've got 21 new names
16 that need to be drawn, so I'll just go ahead and do that,
17 and there might be more as time goes on. And, Mr. Gordon,
18 you said there are some you haven't heard from.

19 MR. GORDON: That's right, Your Honor. There are
20 an additional 15 we have not heard from, but they're coming
21 in every day. Some have come in this morning, so.

22 THE COURT: Okay.

23 MR. GORDON: But I think, Your Honor, that's a
24 good compromise because I think statistically it's unlikely
25 we would want to replace any of those, but if something did

1 come up, we would want the opportunity to discuss it with
2 the defense and bring it to the Court.

3 THE COURT: All right. Thank you very much.

4 An update on the number of cases. That number
5 keeps going up.

6 MR. GORDON: I think we're up to 1241. And I
7 think 54 in Ramsey county.

8 MS. ZIMMERMAN: That's correct. That have been
9 filed. I believe that there are additional Ramsey County
10 cases that are pending that have been served but not yet
11 filed.

12 MS. YOUNG: Your Honor, I don't have any
13 additional information. The numbers are changing almost
14 daily because we've had dismissals come in in both
15 jurisdictions, but it's approximately what is reflected
16 here.

17 THE COURT: It's been about that 54 for quite a
18 while, hasn't it?

19 MS. YOUNG: Yes, and I do think it might be just
20 slightly lower than that, but maybe it's that we haven't
21 received service of everything in Ramsey County, so.

22 THE COURT: Anyway.

23 JUDGE LEARY: Yeah, our count is 54. We had two
24 dismissals on two new filings, so that would square with
25 what we have.

1 THE COURT: So the update on the City of Saint
2 Louis cases?

3 MR. HULSE: Yes, Your Honor. So the latest there
4 is that one of the two cases, the two cases that both have a
5 few more than 50 plaintiffs, the District Court has stayed
6 proceedings pending the JPMLs transfer to the MDL. The
7 other case the Court hasn't acted on a motion to stay, but
8 also hasn't taken any action on the plaintiffs' motion to
9 remand.

10 So there's a conditional transfer order out there.
11 The plaintiffs filed an objection to the conditional
12 transfer order on the basis of the pendency of their motion
13 to remand. The JPML has consistently said that a remand
14 motion will not block transfer to the MDL, so it's our
15 expectation that those cases will make it to this Court at
16 some point in the next couple of months.

17 THE COURT: We'll just wait and see.

18 MR. HULSE: Thank you, Your Honor.

19 THE COURT: All right. Rodriguez in Illinois.

20 MS. AHMANN: Nothing new on those cases, Your
21 Honor. At the end of the month there is a status
22 conference, and the goal will be to move that further back.
23 Lawson, the same thing, no changes. And there's a new Texas
24 case I think that we reported on before in discovery is
25 continued in that case, but there's no scheduling order in

1 place.

2 THE COURT: Is that Petitta?

3 MS. AHMANN: Yes. And Canada is still quiet.

4 MS. YOUNG: No activity in the Canadian case.

5 THE COURT: Now, the status of discovery, I know
6 that you were all or some portion of you were here a week or
7 so ago arguing in front of Judge Noel on the Augustine
8 matter, so I trust that you've been heard on that issue.
9 There's, what, some in camera review going on and we'll wait
10 for an order on that.

11 MAGISTRATE JUDGE NOEL: If I could step in here if
12 I could, Judge.

13 THE COURT: Sure, thank you.

14 MAGISTRATE JUDGE NOEL: I ordered production in
15 camera of approximately 100-plus documents that as soon as
16 they come in, Carrie and I will immediately jump on them to
17 get them reviewed and an order issued as quickly as we can.

18 THE COURT: Judge Leary, did you want to see those
19 too? We'll think about that. Anybody here have any wisdom
20 on whether Judge Leary ought to be included in that in
21 camera review?

22 MS. ZIMMERMAN: I would think if the Court would
23 like to be involved, we certainly invite that.

24 MR. BLACKWELL: Good morning, Your Honors. I
25 think we are --

1 THE COURT: Good morning. You've been so quiet.

2 What, are you sick?

3 MR. BLACKWELL: No. You know, every once in a
4 while life intrudes, and we did just learn this morning that
5 our partner's stepson passed away from a heroin overdose.

6 THE COURT: I'm sorry to rib you, but I could tell
7 that you were surrounded by a silence, so we're sorry.

8 MR. BLACKWELL: It's weighing, Your Honor. So
9 that's all.

10 But as to the question Your Honor's posed, I think
11 we're agnostic on it, Your Honor, with all due respect to
12 Judge Leary that we don't have a position on it.

13 JUDGE LEARY: I guess my thought is if it somehow
14 helps my understanding of the Ramsey County cases, it might
15 be beneficial. But I think the issue in front of Judge
16 Franklin is it really relates to discovery and the end
17 result of that. That's what I'm concerned about rather than
18 what goes into the mix before the decision is made.

19 And if there's a desire to revisit that issue, and
20 you want to revisit with the state litigation, you certainly
21 can.

22 MR. BLACKWELL: And perhaps, Judge Leary, after
23 Your Honor confers with Judge Noel as to the nature of it
24 and the likely outcome, you would have a better sense as to
25 whether it would be enlightening for Your Honor.

1 JUDGE LEARY: Okay, thank you.

2 THE COURT: VitaHEAT third party subpoena.

3 MR. HULSE: There's nothing much to update, Your
4 Honor. This is a third party subpoena that the plaintiff
5 served on a manufacturer of a different patient warming
6 device, a conductive warming device that's in a distributor
7 agreement with 3M. The plaintiffs filed their motion like
8 last week. VitaHEAT and 3M's response will go in today, and
9 then it's set for hearing before Judge Noel on the 27th at
10 11:00 a.m.

11 MAGISTRATE JUDGE NOEL: Correct, I have that date
12 on my calendar, and I will hear it then, and I'll look at
13 the papers in advance.

14 MS. ZIMMERMAN: Yes, Your Honor. It's a relevancy
15 objection, and we think based on the master complaint that
16 this is a reasonable alternative design. And given that the
17 VitaHEAT and the HotDog actually is a predicate device for
18 the VitaHEAT product, but we'll be presenting more fulsome
19 argument to Judge Noel in about 10 days.

20 MR. HULSE: I didn't know we were going to have an
21 argument on it, but they can't cite a single case that would
22 show that a different product counts as a feasible safer
23 alternative design. The case law is pretty clear on that.

24 THE COURT: Consider each other foreshadowed with
25 respect to your February 27th arguments.

1 The e-mail production, the wrinkles we had on
2 that, are they smoothed out pretty much?

3 MR. HULSE: I would say so, Your Honor. We made
4 the deadline plus one day because we had an outage. And
5 what's just happening right now is under PTO11, we have
6 privilege logs to get out. And all we noted here is that it
7 may happen in the course of some of the preparation of the
8 privilege log that some documents will be downgraded off the
9 log and produced, but otherwise we're done.

10 MS. ZIMMERMAN: Yes, Your Honor, this has been,
11 the documents have been, e-mails have been produced on a
12 rolling basis, and the privilege logs that counsel alluded
13 to, I believe there's an extension to tomorrow or Friday for
14 another batch of letters on some of the challenges that
15 we've had. So we continue to review those documents and may
16 well be serving some additional discovery in the next week
17 or so.

18 THE COURT: Got a long list of people deposed
19 here, mostly in the past or about half in the past. More
20 past than in the future, but some scheduled.

21 MR. GORDON: Yes, there are depositions continuing
22 throughout the next few weeks, Your Honor.

23 MS. YOUNG: And, Your Honor, if I might, we have
24 found a date for the other 30(b) (6) witness. That's now
25 been scheduled for March 17th. We have also asked

1 plaintiffs at different points whether there are any other
2 3M, Arizant, current or former employees that they intend to
3 depose prior to March 20th discovery cut-off. We would
4 request that any of those requests be made very, very soon
5 because it's going be very hard to get those witnesses in
6 the queue if we don't know about them.

7 MS. ZIMMERMAN: And we have certainly committed to
8 doing that, Your Honor. It's just that we're continuing to
9 review these e-mails that have recently been produced, and
10 as we get through those, we'll make sure to work with
11 defense counsel to get those scheduled.

12 THE COURT: Has the 30(b)(6) notice been sent?

13 MS. ZIMMERMAN: Yes, several, and we have
14 presently depositions going forth on the 6th and 7th of
15 March, and then there will be this additional one on the
16 17th of March. There are some objections to one of the
17 30(b)(6) depositions that we're going to try to work out,
18 but we may be in front of Your Honor or Judge Noel.

19 THE COURT: So now I'm just asking mostly out of
20 my curiosity having to do with some administrative work that
21 I'm doing that I think you know about, are the issues with
22 the one notice, do they have to do with the specificity?

23 MS. ZIMMERMAN: I think that is one of the grounds
24 for objection.

25 MS. YOUNG: I think there is just one notice.

1 There are 18 topics contained in one notice that span
2 product topics, design, regulatory issues, labeling, and so
3 we're trying to find the right combination of witnesses to
4 cover those topics.

5 MS. ZIMMERMAN: That's correct. But to Your
6 Honor's question, I think that one of the objections from
7 opposing counsel has to do with specificity, and so we're
8 going to try to work on that to see if we can narrow the
9 requests such that we can get an appropriate witness
10 identified.

11 THE COURT: If you're willing to stick around a
12 little bit when we're not on the record anymore just to talk
13 about potential improvements. I've given the subject a fair
14 amount of thought in recent weeks, and because I trust you
15 alls' judgment, is that the way they talk down south?

16 MR. BLACKWELL: No, Your Honor. I think the word
17 is "y'all," Your Honor.

18 THE COURT: I can't. It doesn't come out. It
19 won't come out.

20 THE COURT: And the UK business? We're done with
21 that.

22 Judge Noel, anything on your mind before I ask the
23 lawyers if there's anything on their's?

24 MAGISTRATE JUDGE NOEL: I have nothing else to
25 add.

THE COURT: Okay. Judge Leary?

2 JUDGE LEARY: We haven't touched on it this
3 morning, and it's kind of looking a little bit farther down
4 the road, but I think the lawyers should start thinking
5 about any dispositive motions and the creation of a record
6 and what that record will constitute. Will the record be a
7 record established in federal court? Is there going to need
8 to be a separate record established in State Court?

9 My hope that any dispositive motion that applies
10 to either jurisdiction could be tried in one form, but I
11 think you need to think about that and be prepared to
12 address it. And then if you're agreeable to one form, then
13 you have to think in terms of waivers then. So just a heads
14 up.

15 MS. ZIMMERMAN: We will do so. Thank you, Your
16 Honor.

17 THE COURT: Let me ask the attorneys who are
18 participating by telephone, is there anything that any of
19 you would like to add or say? I heard a sound. No?
20 Excellent. Well, then, we're in recess. I appreciate your
21 time.

22 | (Court adjourned at 10:04 a.m.)

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2 REPORTER'S CERTIFICATE
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I, Maria V. Weinbeck, certify that the foregoing is
a correct transcript from the record of proceedings in the
above-entitled matter.

6 Certified by: s/ Maria V. Weinbeck
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Maria V. Weinbeck, RMR-FCRR